

**IN THE SUPREME COURT OF MISSOURI**

**APPELLATE CASE NO. WD76927**

**SUPREME COURT NO. SC94372**

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ANGELA ANDERSON

Appellant

vs.

UNION ELECTRIC COMPANY

Respondent.

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On Appeal from the Circuit Court of Morgan County

Case No. 13MG-CC00034

Honorable Kenneth Michael Hayden, Judge

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**APPELLANT'S SUBSTITUTE BRIEF**

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### **JURISDICTIONAL STATEMENT**

This is an appeal by Plaintiff/Appellant Angela Anderson. The appeal arises from a judgment entered in favor of Respondent, Union Electric, on September 12, 2013 by the Honorable Kenneth Michael Hayden.

On June 10, 2014 the Western District Court of Appeals issued an opinion reversing the trial court's Judgment. See Appendix A8. On September 30, 2014, this Court Sustained Respondent's application for transfer.

### **STATEMENT OF FACTS**

This case arises from the tragic death of Alexandra Anderson, age fourteen and her brother Brayden Anderson, age eight. (L.F. 4-7) On July 4, 2012, Brayden and Alexandra were with their parents, Brian and Angela, at the Anderson's Lake of the Ozarks lakefront property, located in Morgan County, Missouri. (L.F. 7, 43) On July 4, 2012, the children were playing on the dock and in the water near the family dock. (L.F. 7, 43) While the children played stray current from the dock entered the water, shocked the children and caused such muscular discoordination that they could not stay above water, and as a consequence, they drown. (L.F. 7)

On July 1, 2013, Angela Anderson filed a multi-count wrongful death suit against Union Electric Company (hereinafter "UE"), alleging that UE's negligence was a cause of the childrens' deaths. (L.F. 4.) In relevant part, Angela alleged The Lake of the Ozarks is owned by the Defendant, Union Electric Company (hereinafter "UE") (L.F. 4); UE's ownership of the Lake is governed by permits periodically issued by the Federal Energy Regulatory Commission (L.F. 5); that a condition of its ownership of the Lake is

the duty UE has assumed to control and regulate construction and improvements on the shoreline (L.F. 5), including private and commercial docks placed on the Lake (L.F. 5); that incident to its duty to control improvements at the shoreline, UE imposed use fees on dock owners (L.F. 6), including the plaintiff in the instant case (L.F. 6); that the dock and its appurtenances were only present as a result of the permitting allowed by UE and the concomitant “use fee” paid by plaintiff (L.F. 5-6); that UE retained the right to revoke the Andersons dock permit if UE deemed the dock unsafe (L.F. 5); that UE was aware, prior to July 4, 2012, that a number of the electrified docks at the lake lacked adequate protective devices (seawall ground fault interrupters) to prevent stray current in the event of a break in electrical conduit (L.F. 7); that the Anderson dock was one lacking a seawall GFI. (L.F. 7)

On July 25, 2013, UE filed a motion to dismiss the complaint premised on Missouri Supreme Court Rule 55.27(a)(6). (L.F. 15-22) The motion was heard, and an Order granting the motion was filed on September 12, 2013. (L.F. 36) A subsequent motion to file an amended petition was filed October 7, 2013. (L.F. 38-39) The motion to file an amended petition was denied November 14, 2013. (S.L.F. 1) The Notice of Appeal was filed October 10, 2013. (L.F. 48-51)

### **POINTS RELIED ON**

**I. THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS BECAUSE THE IMMUNITY GRANTED BY MISSOURI REVISED STATUTE SECTION 537.345 (THE RECREATIONAL USE ACT) DOES NOT APPLY, IN THAT THE PLAINTIFF HAS PLEADED THAT A USE FEE WAS CHARGED**

**AND IT IS FURTHER EXCEPTED FROM APPLICATION AS THE AREA IN WHICH THE INJURY OCCURRED IS “NON-COVERED LAND” WITHIN THE MEANING OF THE RECREATIONAL USE ACT.**

Hughey v. Grand River Dam Authority, 897 P.2d 11388 (Okla.1995)

Lundquist v. Nickels, 605 N.E.2d 1373 (Ill.App.1<sup>st</sup> Dist. 1992).

R.S.Mo § 537.348

**II. THE TRIAL COURT ERRED IN DENYING THE PLAINTIFF’S MOTION TO AMEND HER PETITION BECAUSE MOTIONS TO AMEND ARE TO BE FREELY ALLOWED IN THAT THE AMENDMENT SET FORTH PLAINTIFF’S DECEDENTS’ USE OF THE DOCK EXCEPTS RESPONDENT FROM THE IMMUNITY PROVIDED BY MISSOURI REVISED STATUTE SECTION 537.345.**

Bates v. State, 664 S.W. 2d 563 (Mo.App.E.D.1983)

Missouri Rule of Civil Procedure 55.27(a)(6)

### **ARGUMENT**

**I. THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS BECAUSE THE IMMUNITY GRANTED BY MISSOURI REVISED STATUTE SECTION 537.345 (THE RECREATIONAL USE ACT) DOES NOT APPLY, AS THE PLAINTIFF HAS PLEADED THAT A USE FEE WAS CHARGED AND IT IS FURTHER EXCEPTED FROM APPLICATION AS THE AREA IN WHICH THE INJURY OCCURRED IS “NON-COVERED LAND” WITHIN THE MEANING OF THE RECREATIONAL USE ACT.**

## **A. STANDARD OF REVIEW**

The standard of review on an order granting a motion pursuant to Missouri Supreme Court Rule 55.27(a)(6) is *de novo*. *Dibrill v. Normandy Associates, Inc.* 383 S.W.3d 77, 83 (Mo.App. E.D.,2012).

## **B. ARGUMENT**

The Defendant's motion was premised on Missouri Supreme Court Rule 55.27(a)(6).

A motion to dismiss for failure to state a claim on which relief can be granted is solely a test of the adequacy of the petition. *Bromwell v. Nixon*, 361 S.W.3d 393, 398 (Mo. banc 2012). When considering whether a petition fails to state a claim upon which relief can be granted, we review the petition "in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010). In so doing, we accept as true all properly pleaded facts, giving the pleadings their broadest intendment, and construe all allegations favorably to the pleader. *Id.* Our review of a dismissal for failure to state a claim is *de novo*.

*Miles ex rel. Miles v. Rich*, 347 S.W.3d 477, 481 (Mo.App. E.D.2011)

*Dibrill v. Normandy Associates, Inc.* 383 S.W.3d 77, 83 (Mo.App. E.D. 2012)

At common law a landowner owes a duty to exercise reasonable care to prevent injuries to persons on their property. *Gillespie v. St. Joseph Light & Power Co.*, 937 S.W.2d 373 (Mo.App. W.D. 1996); *see also*, W. Page Keeton, et al., *Prosser & Keeton on the Law of Torts*, Section 57 at 386-87 (5<sup>th</sup> ed. 1984). In symbiosis with this duty is the legal right of redress when a landowner fails to exercise reasonable care and causes actionable injury.

The Recreational Use Act (hereinafter “RUA”) creates a limited immunity, not recognized at common law, for certain landowners in certain scenarios. As the RUA abrogates an injured person’s common law legal right to compensation for injuries negligently caused, the RUA is in derogation of the common law. “Derogation is defined as ‘[t]he partial abrogation or repeal of a law, contract, treaty, legal right, etc.’ or as a lessening, weakening, curtailment, impairment,’ detracting or taking away of a power or authority.” *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748 (Mo.App.W.D. 2008). Thus, the analysis of the RUA’s applicability must take place with the overarching understanding that the immunity, in derogation of common law, must be strictly construed, with “close calls” construed in favor of maintenance of the common law rule. *Overcast v. Billings Mutual Ins. Co.*, 11 S.W.3d 62, 69 (Mo.banc

2000). On the face of the Petition, Defendant fails to fall within the class of landowners provided immunity by the Act for two reasons.

**a. Plaintiff Has Pleaded a Use Fee was Charged, Excepting Defendant from Immunity.**

In the instant case Plaintiff has pleaded she, along with other dock owners, was charged a fee for, *inter alia*, dock placement, use and enjoyment on the Lake. (L.F. 5, 41) On its face, the RUA provides no immunity where the owner charges a “user fee” *Lonergan v. May*, 53 S.W.3d 122, 127 (Mo.App.W.D 2001). The Plaintiff has pleaded that such a fee was charged. (L.F. 5, 41) As such, Defendant cannot avail itself of the immunity afforded by the Act through a Motion to Dismiss.

The Trial Court’s Order and Judgment sets forth no specific finding with respect to this point. (L.F. 36-37; App. A1) Nevertheless, at Paragraph Eight of the Petition, Plaintiff has clearly pleaded she was charged a “use fee” for “placement, maintenance, use and/or enjoyment of...” her dock. (L.F. 5, 41) Plaintiff’s decedents were swimming from the dock for which a use fee was charged. (L.F. 5, 7, 41, 43) As noted above, the RUA is in derogation of common law and therefore is to be strictly construed.

Union Electric does not deny its program of charging various “user fees” to those who seek to avail themselves of the Lake’s recreational aspects through the placement, maintenance and use of docks. Union Electric’s right to levy such fees has been litigated by Union Electric previously. *See, The Coalition for Fair and Equitable Regulation of Docks on the Lake of the Ozarks v. Federal Energy Regulatory Commission*, 297 F.3d 771 (8<sup>th</sup> Cir. 2002). The *Coalition* Court affirmed the authority of licensees such as Union

Electric to charge “reasonable fees to users of such facilities [e.g. recreational facilities] in order to help defray costs...” *Id* at 775. In effect, FERC authorized and the 8<sup>th</sup> circuit affirmed Union Electric’s rights to charge user fees to certain classes of users of the Lake (those who recreated at the Lake through the establishment, maintenance and enjoyment of docks). The Plaintiff has asserted the Andersons paid such a fee to recreationally enjoy the Lake through the dock and its appurtenances.

Review of RSMo Section 537.345(1) defines “charge” as: “the admission price or fee asked by an owner of land or permission without price or fee to use land for recreational purposes when such invitation or permission is given for the purpose of sales promotion, advertising or public goodwill in fostering a business purpose.” The trial court did not explain why the fee Defendant charged did not qualify as a “charge” within the meaning of the RUA.

In any event, a close review of the RUA reveals that a landowner will not be immunized from liability where an admission price has been charged or where a fee is levied to use the land for recreational purposes. Here the children were using the dock as an entry point to the water and also as a vehicle through which to enjoy Defendant’s property. (L.F. 43) Respondent levied a charge for the dock’s placement and use. (L.F. 5, 41). The family had paid a fee to place and use the dock, which was what the Anderson children were doing at the time of their deaths.

No prior Missouri case involving the RUA has also included allegations of fees charged. In *Foster v. St. Louis County*, 239 S.W.3d 599 (Mo.banc 2008) it was conceded that the Plaintiff paid no fee whatsoever. Similarly, in *State ex. Rel. Young v. Wood*, 254

S.W.3d 871 (Mo. Banc 2008) there was no suggestion the Plaintiff paid any monies to access or hunt upon the defendant's land. In the Western District case, *Loneragan v. May*, 53 S.W.3d 122 (Mo.App.W.D 2001) Plaintiff did not allege any payment to Union Electric by Plaintiff, nor was a dock fee charged. *Id* et 125.

Absent Missouri precedent, Plaintiff suggests a neighboring jurisdiction offers guidance. *Lundquist v. Nickels*, 605 N.E.2d 1373 (Ill.App.1<sup>st</sup> Dist. 1992).

In *Lundquist*, Plaintiff was injured on Defendant's property while riding a motorcycle brought on to Defendant's land by one of Plaintiff's companions. Plaintiff was not personally charged for her entry on to the land, but her companion was charged four dollars for the privilege of bringing his motorcycle onto the property. The *Lundquist* Court held such a charge qualified as a "charge to enter onto his property" within the meaning of Illinois' Recreational Use Act. *Id* at 1383. The same rationale as applied in the *Lundquist* case should be employed by this Court. As noted in the proposed amended petition, the children were playing on the dock and entered through the dock. (L.F. 43) The children's parents were charged a use fee for the dock. (L.F. 5, 41) Construing the pleadings in a manner of broadest intendment, logic and reason compel one to regard the use fee as a charge within the meaning of the RUA.

The trial court below considered *Foster v. St. Louis County*, 239 S.W.2d 599 (Mo.banc 2007) in reaching its judgment. However, *Foster* is inapposite.<sup>1</sup> In *Foster* the

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<sup>1</sup> As a threshold matter, it should be noted *Foster* was on appeal from a summary judgment, supported by factual pleading extraneous to the Petition whereas the instant

Plaintiff conceded no fee was charged to the Plaintiff. Moreover, in *Foster*, the area where the injury occurred had no associated charges placed against anyone. Conversely, in the instant case Plaintiff was charged for the placement, use and enjoyment of the dock. (L.F. 5, 41) Both procedurally and substantively, on the face of the pleading, *Foster* offers no cogent support for the trial court's decision.

At the trial court, argument was offered that the charge placed against Plaintiff was too remote in time. (L.F. 19) Nothing in the RUA provides a lower limit for fees, or a time limitation for the interval between payment and injury. As the immunity is in derogation of the common law, strict construction prohibits this Court from inferring a temporal or *de minimus* payment scheme not found in the plain language of the statute.<sup>2</sup> At the trial court level, citation was also made to *Loneragan v. May*, 53 S.W.3d 122 (Mo.App.W.D. 2001). (L.F. 13, 15, 17, 20, 33, 36, 27-29; App. A6) *Loneragan* is also inapposite to this decision as there was no allegation of any fee charged in relation to enjoyment of the defendant's property.

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motion is brought pursuant to Supreme Court Rule 55.27. Here the Defendant chooses to inappropriately submit suggestions of fact not contained within the pleadings. As such, Defendant's citation to unsupported fact should not be considered. (L.F. 19)

<sup>2</sup> The Petition in this case does not specify a date for payment of the fee. (L.F. 4-11) As it is not on the face of the Petition, but is merely a factual allegation offered in the Respondent's Memorandum, it further was not properly before the trial court on a motion to dismiss for failure to state a claim. *Bromwell, supra*.

**b. The Portion of Lake Where the Fatal Injuries Took Place Was**

**“Noncovered Land” Within the Meaning of the Recreational Use Act.**

Not only is the RUA inapplicable due to the fee charged by respondent, but its application is further excepted by the fact the area of the childrens’ fatal contact was “noncovered land” as defined by the RUA. The RUA clearly provides that no immunity attaches for injuries occurring on “noncovered land.”

**“Noncovered land”** as used herein means any portion of any land, the surface of which portion is actually used primarily for commercial, industrial, mining or manufacturing purposes; provided, however, that use of any portion of any land primarily for agricultural, grazing, forestry, conservation, natural area, owner's recreation or similar or related uses or purposes shall not under any circumstances be deemed to be use of such portion for commercial, industrial, mining or manufacturing purposes.

R.S.Mo § 537.348.

As noted in *Loneragan, supra*, a landowner will not be immune from liability for those portions of its land used primarily for commercial purposes. *Id* at 129. In this case Union Electric’s use of the dock and the water of the lake immediately adjacent thereto were used primarily for commercial purpose. Appellant’s Petition clearly sets forth the allegation that a fee was charged.<sup>3</sup> (L.F. 5) That a fee is a commercial transaction cannot

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<sup>3</sup> In *Loneragan* no allegation was made that the area of the accident served any commercial purpose but the generation of hydroelectric power.

credibly be questioned. No other use by Union Electric is suggested in the Petition for this portion of the Lake, other than perhaps its overarching use as a source for hydroelectric power.

The foregoing point is best understood in the context of Union Electric's obligations, voluntarily undertaken, acting as operator and licensee of the Osage Project. The Federal Water Power Act of 1920 authorized the Federal Energy Regulatory Commission (FERC) to issue licenses to licensees to build and operate hydroelectric plants on navigable waters of the United States. *Coalition*, at 774. Union Electric is the licensee for the "Osage Project No. 459." It is self-evident that Union Electric undertook the license with the commercial purpose of generating electric power for sale to its customers. As a condition of its license, "FERC has adopted a regulation placing responsibility on a project licensee to develop their project's recreational resources." *Id.* at 775.

Pursuant to Article 41 of the Union Electric license, Union Electric can grant permission for certain recreational uses including, *inter alia*, non-commercial docks. The license also charges Union Electric with the responsibility to ensure the docks are of "suitable design." *Id.* This may be done through permitting programs which "may be subject to the payment of a reasonable fee." *Id.* Nothing mandates Union Electric charge a fee. Rather, it is elective. Here, Union Electric has chosen to impose a comprehensive "use fee" program for all docks along the Lake's 1,150 miles of shoreline. These fees are commercial in nature, rendering the subject matter of the fees, the docks, areas of commercial activity.

In *Loneragan* the Court noted the statute provided a qualification for the commercial activity exception for land that is primarily used for “recreational” purpose. The Court then set about weighting and evaluating the commercial use of the Lake in the area of that accident as compared to the plaintiff’s recreational use of the Lake in the area of the accident. Appellant respectfully submits the *Loneragan* approach to this exception failed to properly construe the actual language of the statute.

The plain language of the statute absolutely inures a landowner from liability only where the parcel is used “... primarily for agricultural, grazing, forestry, conservation, natural area, **owner's** recreation or similar or related uses or purposes.” The plain language of the statute suggests immunity attaches for land primarily used for the owner’s recreation, regardless of a concomitant commercial use where the recreational use predominates. Nowhere in the pleadings before the Court is it suggested that Union Electric made any recreational use of the Anderson dock or adjacent water. Rather, Union Electric’s singular interest in the dock area was the collection of fees from Plaintiff. (L.F. 5).

The *Loneragan* Court chose to focus its inquiry “...on the nature of the activity and use of the portion of the land in question by the owner **and guests** to determine its purpose [emphasis added].” *Loneragan*, 53 at 131. The law does not speak to any guest recreation, only the owner’s recreation. Appellant respectfully submits this approach is in direct conflict with the vast weight of Missouri authority on the issue of statutory construction and the construction of statutes in derogation of the common law.

Statutory construction is a matter of law. *Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126, 130 (Mo.App. E.D.2007). It is incumbent on the Court to give effect to the plain language of the statute, and to not engage in statutory construction. “We presume that the legislature intended that each word, clause, sentence, and provision of a statute have effect and should be given meaning.” *Abbott Ambulance v. St. Charles County Ambulance District*, 193 S.W.3d 354, 358 (Mo.App.2006); *State ex rel. Womack v. Rolf*, 173 S.W.3d 634, 638 (Mo. banc 2005). “Conversely, we presume that the legislature did not insert superfluous language or idle verbiage in a statute. *Abbott Ambulance* at 358. Courts are not authorized to read a legislative intent into a statute that is contrary to the intent made evident by the plain and ordinary meaning of the statutory language.” *Id.* The RUA in plain, unambiguous language, defines the relevant recreational use to be “the owner’s recreation [al]” use. Thus, the relevant inquiry on the issue of recreation is Union Electric’s recreational use of the Lake in the area of the Anderson dock, not the Anderson’s or any other invitee’s use. The Court is to presume the legislature did not insert idle verbiage or superfluous language. *Id.* Yet, to include the invitee’s viewpoint on the issue of recreation is to make the use of the term “owner’s” meaningless. Had the legislature intended all persons’ viewpoints of recreation to be relevant, they would not have qualified it with “owner’s.” Nothing in Plaintiff’s Petition suggests the owner made any recreational use of the Anderson dock or the Lake in the immediate vicinity thereof. (L.F. 4-11, 38-47) Accordingly, the RUA is inapplicable as the parcel described in the Petition is “noncovered” within the plain meaning of the RUA. (L.F. 4-11, 38-47)

*Lonergan* cited with some approval an Oklahoma Supreme Court case, dealing with the Oklahoma version the Recreational Use Act. *Hughey v. Grand River Dam Authority*, 897 P.2d 11388 (Okla.1995). The Hughey decision supports the denial of immunity in the instant case. *Hughey* involved an injury claim arising out of a boat striking an unmarked, submerged obstacle. The *Hughey* Court found the bar to immunity did not apply as the commercial purpose of the defendant (the generation of power) was wholly unrelated to the invitee's recreational use of the property (boating, for which no charge was levied). Thus, *Hughey* found no "profit related nexus to the admitted public's presence upon the premises". *Lonergan* at 132, quoting, *Hughey v. Grand River Dam Authority*, 897 P.2d 1138, 1143 (Okla.1995). The obvious corollary to this principle is, where there is a profit related nexus to the admitted public presence, there should be no immunity.

Under the facts of *Lonergan*, there was no commercial activity beyond the Lake's function as a hydroelectric facility and thus no nexus between the invitees' use of the Lake (boating) and the commercial pursuit (hydroelectric power). In the instant case, however, there is a clear nexus between the fees charged, the dock and the injuries suffered. They are inseparable. The Anderson children were swimming from a dock which Union Electric regulated, for which they assumed a duty to ensure it was of suitable design and for which they levied fees and charges. (L.F. 4-7, 38-41) But for the permitting scheme of Union Electric, the dock would not have been present and no stray current would have been present. Accordingly, Union Electric Company is not entitled to assert immunity in this case.

*Loneragan*'s citation to three Alabama cases on the issue of commercial purpose is misplaced. The Alabama recreational use act has no exception for "noncovered" land as we have in Missouri. Code of Ala.1975 Section 35-15-1, *et seq.* Further, in none of the cases was there any allegation of a fee paid. Quite simply, the Alabama authority is of no utility for interpretation of Missouri's RUA under the facts in the instant case.

**c. A Finding of No Immunity in Favor of Union Electric is not Inconsistent with the Purposes of the RUA.**

The purpose the RUA is to encourage landowners to open their land for public recreation. The inducement for this public good is a limitation on liability. *Loneragan*, at 127. Implicit in the purpose is the landowner's discretion to permit public access. Union Electric's decision to open the Lake to the public is not one of public beneficence. Rather, it is an obligation incident to its desire to generate hydroelectric power from a navigable water of the United States. Appellants respectfully submit that the majority of landowners in Missouri do not hold interest to their property through a renewing license issued by a federal agency that mandates such property be maintained with public recreation accommodated. Finding no immunity in favor of Union Electric will not impact other Missouri landowners as Union Electric's possessory investment in the lake is rather unique.

The purpose of the RUA is to grant immunity where no fees are charged for admission or use, provided the area of injury is not one otherwise developed by the owner for commercial enterprise. It has been ambiguously asserted that a slew of property owners who allow access to their lands will be affected due to their charging other fees,

not strictly for admission. What these fees may be are left for idle speculation. Clearly, the Act, on its face, is not designed to immunize those seeking to derive profit from users of the property.

Accordingly, Union Electric is not entitled to immunity as afforded by the Recreational Use Act.

**II. THE TRIAL COURT ERRED IN DENYING THE PLAINTIFF'S MOTION TO AMEND HER PETITION BECAUSE MOTIONS TO AMEND ARE TO BE FREELY ALLOWED IN THAT SAID AMENDED PETITION CLARIFIED THE DECEDENTS' USE OF THE DOCK STRUCTURE FOR WHICH A USE FEE WAS CHARGED, EXCEPTING DEFENDANT FROM THE IMMUNITY PROVIDED BY THE RECREATIONAL USE ACT.**

**A. STANDARD OF REVIEW**

The standard of review for a denial of a motion to amend pleadings is an abuse of discretion.

**B. ARGUMENT**

On October 7, 2013, Plaintiff filed her motion to amend the petition to include more specific allegations that the point of entry to the Lake was the dock, the subject of the use fees. (L.F. 38-47) Though reading the initial petition in a light most broad, consistent with the rules of Rule 55.27(a)(6) leads to the logically intuitive conclusion that the dock was a point of entry and part of the childrens' play, (L.F. 7; App. A5) the proposed amended petition sought to make these allegations more explicit. (L.F. 43) In *Bates v. State*, 664 S.W,2d 563 (Mo.App.E.D.1983) the Court correctly recognized that

denial of a motion to amend a petition is only appropriate where the claim is irrefutably precluded. Here, as set forth in Point One of Appellant's Brief, the Plaintiff's claim is not "irrefutably precluded" as the immunity afforded by the RUA is inapplicable. The Defendant levied a charge within the meaning of the RUA and the fatal injuries took place on noncovered land within the meaning of the RUA. (L.F. 5, 41) As such, the denial of the proposed amendment was an abuse of discretion and the decision of the trial court should be reversed.

### **CONCLUSION**

The standard of review for motions brought pursuant to Rule 55.27 strongly favors the Plaintiff. All averments in the Petition must be accepted as true, and all reasonable inferences must be liberally construed in Plaintiff's favor. As the RUA creates immunity in derogation of common law, it is to be strictly construed with any ambiguity interpreted in favor of the common law. Plaintiff has pleaded facts that a fee was charged associated with entry to, and use of, Defendant's property. As such, the immunity of the RUA is inapplicable. Further, Plaintiff has pleaded facts from which one can reasonably infer the portion of the Lake property in question was primarily of commercial purpose and therefore was "noncovered" property. Moreover, as the appellant's claim against the respondent was not irrefutably precluded by the RUA, the trial Court erred in denying the proposed amendment. For the foregoing reasons, Plaintiff respectfully requests this Court reverse the trial court's order of September 12, 2013, reverse the order denying plaintiff's motion to amend her petition and remand this matter for further proceedings consistent therewith.

Respectfully submitted,

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IN THE SUPREME COURT OF MISSOURI

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ANGELA ANDERSON	)	
	)	
Appellant,	)	Civil Case No. 13MG-CC00034
	)	
vs.	)	Appellate Case No. WD76927
	)	
UNION ELECTRIC COMPANY	)	Supreme Court No. SC94372
	)	
Respondent.	)	

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**APPELLANT'S CERTIFICATE OF COMPLIANCE**

COMES NOW Appellant, Angela Anderson, by and through her attorneys of record, and certifies that Appellant's Substitute Brief complies with the limitations contained in Rules 84.06(b) and 55.03. Appellant's Substitute Brief contains 5,156 words and 520 lines. Counsel for Appellant relied upon the word and line count of his word processing system in making this certification.

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	)	
<b>UNION ELECTRIC COMPANY</b>	)	<b>Supreme Court No. SC94372</b>
	)	
<b>Respondent.</b>	)	

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**APPELLANT'S CERTIFICATE OF SERVICE**

Counsel for Appellant certifies that Appellant's Substitute Brief and Appendix for Substitute Brief was served in the following manner pursuant to Rule 84.05(a) and to the following parties on November 7, 2014:

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